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IN THE

# Supreme Court of the United States

SOUTH DAKOTA DEPARTMENT OF REVENUE,
*Petitioner*,

v.

LOREN POURIER, D/B/A MUDDY CREEK OIL & GAS, INC.,
and MUDDY CREEK OIL & GAS, INC.,
*Respondents.*

**On Petition for a Writ of Certiorari to the Supreme Court of the State of South Dakota**

## *AMICUS CURIAE* BRIEF OF THE NATIONAL ASSOCIATION OF CONVENIENCE STORES IN SUPPORT OF THE SOUTH DAKOTA DEPARTMENT OF REVENUE'S PETITION FOR WRIT OF CERTIORARI

SCOTT A. SINDER *
DOUGLAS S. KANTOR
COLLIER SHANNON SCOTT, PLLC
3050 K Street, N.W., Suite 400
Washington, DC 20007
(202) 342-8400

* Counsel of Record

*Counsel for Amicus Curiae National Association of Convenience Stores*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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The National Association of Convenience Stores (NACS) respectfully submits this brief as *amicus curiae* in support of the Petitioners in accordance with the provisions of Supreme Court Rule 37.2.[1] All parties have consented to this filing, and their written consents have been lodged with the Court.

## INTEREST OF *AMICUS CURIAE*

Founded in 1961, NACS is a non-profit trade association representing more than 1,700 retail and 1,700 supplier company members in the United States and abroad. NACS is the pre-eminent representative of the interests of convenience store operators. Its retail members operate more than 77,000 convenience stores worldwide. The majority of NACS retail members sell motor fuels (gasoline and diesel fuel) and NACS member companies collectively sell over 55 percent of all gasoline marketed in the United States each year. Overall, more than 100,000 convenience stores in the United States sell motor fuels.

If allowed to stand, the decision below requiring South Dakota to refund the taxes it has collected on motor fuels sold at Respondents' retail outlet would exacerbate competitive problems caused by the avoidance of motor fuel taxes by Native American retailers on reservations. Such tax avoidance often creates untenable competitive disadvantages for off-reservation retailers and deprives states of needed revenue.

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[1] This brief was not authored, in whole or in part, by counsel for any other party to this matter. No one other than *amicus curiae* the National Association of Convenience Stores, its members, and its counsel made any monetary contribution to the preparation or submission of this brief.

## STATEMENT OF THE CASE

This case will determine whether states can protect their motor fuel tax revenues and stop unfair competition from driving off-reservation retailers out of business. In the decision below, the Supreme Court of South Dakota held that the Hayden-Cartwright Act does not authorize states to collect taxes on sales of motor fuels made on Indian reservations. As pointed out in the Petition for Writ of Certiorari, that holding does not comport with the language or the history of the Hayden-Cartwright Act. This Court has never addressed the issue presented in this case and should take this opportunity to do so because resolution of this issue is of critical importance to private businesses and states throughout the nation. If allowed to stand, the holding of the Supreme Court of South Dakota will lead to an erosion of state revenues and will bankrupt many off-reservation businesses.

State taxes constitute a large proportion of the prices of both gasoline and diesel fuel. On average, in fact, state taxes on each gallon of these products are greater than the per-gallon profits that retailers make on these sales. Accordingly, if one class of retailer (those located on Indian reservations) does not pay state taxes on the motor fuels it sells, the competitive advantage is likely impossible for other retailers to overcome.

Competition between motor fuel retailers located on and off of reservations is common. On-reservation retailers purposely establish their businesses in locations calculated to draw business from outside the reservation. The negative impact of this competition for off-reservation motor fuel retailers is typically dramatic. Unless this Court resolves this issue, unfair competition from on-reservation retailers is

likely to increase and cause additional damage to off-reservation retailers.

In addition, states will lose substantial revenue unless this issue is addressed. States already lose about $1.4 billion per year in gasoline and cigarette taxes due to on-reservation sales.[2] As additional on-reservation retail operations are established and compete with off-reservation retailers, these lost revenues will increase. The states' lost revenues will be aggravated by the income and property taxes lost when off-reservation retailers go out of business. Use tax revenues on fuel sales to interstate commercial motor vehicle operators also will be lost because the decision below makes it difficult, if not impossible, to properly implement the International Fuel Tax Agreement.

## ARGUMENT

### I. THE COURT SHOULD GRANT THE PETITION FOR WRIT OF CERTIORARI BECAUSE OF THE IMPORTANCE OF THE QUESTION OF WHETHER THE HAYDEN-CARTWRIGHT ACT AUTHORIZES STATES TO IMPOSE MOTOR FUEL TAXES UPON SALES THAT OCCUR ON INDIAN RESERVATIONS.

States' ability to impose taxes on sales of motor fuels made within Indian reservations has wide-ranging ramifications not only for states but for thousands of private businesses throughout the nation. Businesses including convenience stores, truck stops, travel plazas, and traditional gasoline

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[2] Taxes lost on cigarette sales include those made by on-reservation retailers over the Internet, by telephone and through the mail.

stations sell motor fuels. These businesses are placed at a competitive disadvantage when reservation retailers sell motor fuels without collecting state taxes.

The potential for pronounced competitive effects on businesses as well as the strain on state budgets makes resolution of the question presented in this case essential. Petitioner in this case contends that the Hayden-Cartwright Act, 4 U.S.C. § 104, authorizes states to tax motor fuels sold on Indian reservations. While state courts in Idaho, North Dakota, and South Dakota, and federal courts in Idaho and Kansas have directly addressed this question, this Court has never done so. *Compare Winnebago Tribe of Nebraska v. Kline*, 297 F. Supp. 2d 1291, 1304-05 (D. Kan. 2004); *Prairie Band of Potawatomi Nation v. Richards*, 241 F. Supp. 2d 1295, 1303-07 (D. Kan. 2003) (describing as unfortunate the lack of guidance from the Circuit Courts or Supreme Court on whether the Hayden-Cartwright Act authorizes taxation of motor fuels on reservations); *Coeur D'Alene Tribe v. Hammond*, 224 F. Supp. 2d 1264, 1268-69 (D. Idaho 2002); *Pourier v. South Dakota Department of Revenue*, 658 N.W.2d 395, 403 (S.D. 2003); *Goodman Oil Co. v. Idaho State Tax Comm'n*, 136 Idaho 53, 55-59 (2001); *In re State Motor Fuel Tax Liability of A.G.E. Corp.*, 273 N.W.2d 737, 739 (S.D. 1978), *with Oklahoma Tax Comm'n v. Chikasaw Nation*, 515 U.S. 450, 456-57 (1995) (refusing to consider effect of Hayden-Cartwright Act on reservation sales because the issue was not raised in the court below or at the petition stage); *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 151 n.16 (1980) (finding pre-emption based on the law regarding tribal timber and not addressing applicability of the Hayden-Cartwright Act to reservation sales generally). The need for guidance on this critical issue is apparent. The United States District Court for the District of Kansas has noted that this is a "difficult" issue to resolve

and that the lack of guidance in resolving it is unfortunate. *Richards*, 241 F. Supp. 2d at 1304. Because the stakes are so high for the economic well-being of states and private businesses, this Court should accept this case and provide the lower courts with the guidance they need to resolve future disputes.

### A. Differences In State Taxes Paid Can Place Off-Reservation Retailers At A Pronounced Competitive Disadvantage Vis-à-Vis On-Reservation Retailers.

Every state imposes volume taxes on gasoline and diesel fuel. Federal Highway Administration, Monthly Motor Fuel Reported by States (December 2002). State taxes account for a large portion of the price of a gallon of gasoline and diesel fuel. In 2002, state excise taxes averaged 19.1 cents per gallon for gasoline and 20 cents per gallon for diesel fuel. *Id.* These state excise taxes alone were more than 14 percent of the $1.35 average price of a gallon of gasoline and eleven states imposed additional sales and other taxes on top of their excise taxes. *See* Energy Information Administration, A Primer on Gasoline Prices 2 (2003). By comparison, the average profit margin for a convenience store on its sales in 2002 was 12.7 cents per gallon for gasoline and only 9.6 cents per gallon for diesel fuel. National Association of Convenience Stores, 2003 State of the Industry 1, 75 (2003). This means that an average convenience store would have to sell gasoline at a substantial loss in order to price its fuel to be competitive with an on-reservation retailer that does not pay state taxes on its fuel.

On-reservation retailers use their price advantage to compete with off-reservation retailers. On-reservation retailers typically establish locations near reservation borders and

major highways in order to entice customers that might otherwise patronize off-reservation stores. The United States holds 55.7 million acres of land in trust for the 562 federally recognized tribal governments. United States Bureau of Indian Affairs *at* http://www.doi.gov/bureau-indian-affairs.html. These lands provide many options for strategic, competitive placement of motor fuel retail outlets. Nearly every state has federally recognized tribes and there are reservations in more than twenty-five states. The ubiquity of tribes and reservation lands creates substantial risk that competitive threats to off-reservation retailers from on-reservation retailers and drains on state budgets will increase.

This situation presents a poor business outlook for many off-reservation retailers. Motor fuels made up 62.4% of total sales for convenience stores in 2002. National Association of Convenience Stores, 2003 State of the Industry 5 (2003). Competition from on-reservation retailers that do not pay state motor fuel taxes can cause dramatic reductions in sales. In New York, for example, on-reservation retailers often sell more than 100,000 gallons of gasoline per week while their off-reservation competitors sell only about 30,000 gallons per week. Losses caused by tax-free competition from tribal retailers often cannot be made up by stores at other locations because more than 78,000 of the approximately 101,000 convenience stores selling motor fuels in the United States in 2002 were single store operators, *Id.* at 22, 74, and the average convenience store's *pre*-tax profits in 2002 were $20,400. *Id.* at 10. In light of the importance of motor fuel sales to convenience stores, the small profit margins for these businesses, and the large number of single store operations, many convenience stores simply cannot survive competition from reservation retailers that do not pay state taxes.

Examples of the dramatic, negative impact that tax-free sales of motor fuels on reservations can have are numerous. One convenience store operator in Buffalo saw his monthly gasoline sales fall from 70-80,000 gallons per month to 6,000 gallons per month after a Native American retail operation opened in his area. *Competition, Tax Fairness and Protecting the Tax Base of State and Local Governments: Hearing on H.R. 1168 Before the House Committee on Resources*, 105th Cong. (1998) (statement of William E. Haslam, President, Pilot Corporation). In Oklahoma, one of Love's Country Stores operating outside of a reservation lost $5,000 on sales of more than $6.5 million. *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of Greg Love, President, Love's Country Stores, Inc.). If that same store had made the same sales but not paid the state taxes because it was owned by a tribal member, it would have made a profit of more than $925,000. *Id.*

In fact, a 1998 market survey of the state of New York found that 70 percent of the residents interviewed who lived in counties adjacent to Indian reservations purchased tax-free items from Native American retailers. *Id.* One out of five respondents patronized reservation retailers more than once each week. *Id.*

The steep discounts that tribal retailers can offer if they do not pay state taxes can draw customers even from distant businesses. *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of Representative Ernest J. Istook, Jr.). The result of these market factors is that if states cannot collect excise taxes for on-reservation sales of motor fuels, many convenience stores will not survive.

## B. State Budgets Suffer If States Cannot Impose Taxes For On-Reservation Sales Of Motor Fuel.

Because of the volume of sales made by on-reservation retailers of motor fuels, the states lose substantial revenue if they do not collect taxes on these sales. Reservation retailers in New York, for example, failed to pay approximately $300 million in state taxes on motor fuel and tobacco to the state in 1998. *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of N.Y. Assemblyman Jeffrey Klein); *Competition, Tax Fairness and Protecting the Tax Base of State and Local Governments: Hearing on H.R. 1168 Before the House Committee on Resources*, 105th Cong. (1998) (statement of John M. MacDougall, President, Nice N Easy Grocery Shoppes). About $200 million of this total was due to unpaid taxes on motor fuels. *Id.* (statement of N.Y. Assemblyman Jeffrey Klein). Similarly, on-reservation sales of motor fuels and tobacco in New Mexico cost the state about $14 million in tax revenue in 1998. *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of John Lattauzio, President, J & J Mini Markets). More recent estimates indicate that state and local governments lose up to $1.4 billion in gasoline and cigarette taxes due to sales made on reservations and, with respect to cigarettes, by means of internet, mail and telephone orders. Glenn Coin, *State May Seek Indian Tax Revenue; Legislators Are Expected to OK Bill that Requires Sales to Non-Indians be Taxed*, The Post Standard, May 2, 2003, at B1.

Limitations on state authority to tax on-reservation sales also lead to increased tax evasion and fraud. This Court, for example, had evidence before it in the case of *Department of*

*Taxation and Finance of New York v. Milhelm Attea & Bros., Inc.*, that the purported consumption of cigarettes by tribal members consistent with New York's plan to only tax non-Indian consumers was 32 times the statewide average rate of consumption. 512 U.S. 61, 65 (1994). As Congressman Ernest J. Istook, Jr. put it, "Unfortunately, some tribes have exploited this exemption [for sales to tribal members], leading non-tribal purchasers to believe they do not owe the sales, fuel or excise taxes on these transactions, since the tribes do not charge them." *Native American Sovereign Immunity: Hearing Before the Senate Committee on Indian Affairs*, 105th Cong. (1998) (statement of Representative Ernest J. Istook, Jr.). The result, of course, is additional revenue losses by the states.

In addition, as noted, competition from on-reservation retailers that do not have to charge state taxes can drive off-reservation retailers out of business. Losing these off-reservation retailers would not only affect their owners and employees, but it would create an additional drain on state revenues. States would lose the excise, sales and other taxes on transactions made at those stores as well as income and property taxes paid by those stores. The drain on state resources due to the inability to tax sales on reservations can quickly multiply far beyond the sum of the losses on individual transactions.

### C. The Decision Below Conflicts With Adherence To The International Fuel Tax Agreement.

The decision of the South Dakota Supreme Court in this litigation also merits review because it calls into question the viability of the International Fuel Tax Agreement (IFTA). Adopted by Congress in 1994, IFTA is an interstate agreement for the collection and distribution of fuel use

taxes. 49 U.S.C. § 31701 (2004). Since September 30, 1996, states have only been permitted to collect fuel use taxes if they comply with IFTA and share the proceeds collected from operators of interstate commercial motor vehicles[3] with other states. 49 U.S.C. § 31705 (b) (2004).[4] These use tax revenues are apportioned among the states based upon the number of miles the interstate operator traveled in each state. Interstate operators of commercial vehicles that purchase motor fuel on a reservation, however, may not know that the state tax has not been charged. Their erroneous reports of the taxes paid may cause difficulties with administration of IFTA. In addition, interstate operators that know they were not charged the state tax may fraudulently report that they paid the tax in order to save money. Catching such fraud would be an overwhelmingly expensive and time-consuming task.

Interstate operators of commercial vehicles are among the most price-sensitive motor fuel purchasers. They may choose the best price between retail outlets that are separated by 100 miles or more of highway. Given the significant price advantage that can result from tax-free sales, a large percentage of these consumers are apt to choose reservation retailers. Accordingly, the decision below undermines the implementation of IFTA and may result in additional tax collection shortfalls for states over and above the loss of excise tax revenue.

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[3] Vehicles covered by IFTA are primarily long haul trucks.

[4] There is an exception to this requirement for states that have continuously participated in the Regional Fuel Tax Agreement since January 1, 1991. 49 U.S.C. § 31705 (d) (2004).

## CONCLUSION

For the foregoing reasons, NACS urges this Court to accept the petition for writ of certiorari and review the decision of the Supreme Court of South Dakota.

Respectfully Submitted,

SCOTT A. SINDER*
DOUGLAS S. KANTOR
COLLIER SHANNON SCOTT, PLLC
3050 K Street, N.W. Suite 400
Washington, D.C. 20007
(202) 342-8400
*Attorneys for Amicus Curiae National Association of Convenience Stores*

* Counsel of Record

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